IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 10537 OF 2004

DR. ROHIT JAYANTILAL OZA ... PETITIONER

vs

SMT. SEEMA RAMESH BHATIA .. RESPONDENT

Mr. Krishnakant Shah with D. P.Shah for petitioner

Ms. Betty D'souza with Mr. M. P. Vashi for respondent

CORAM:-SMT. RANJANA DESAI, J.

DATED:-31-1-2005

P.C.

This petition is filed by the original defendant-tenant. The suit was filed by the plaintiff/landlord on the ground of permanent alteration and additions in the suit premises without her permission. The trial court dismissed the suit. An appeal was carried by the landlord. The appellate

court set aside the order of the trial court and decreed the suit and hence this writ petiton.

2. I have heard at some length, the learned counsel appearing for the petitioner – defendant. He contended that the order of lower appellate court suffers from patent illegality and deserves to be set aside. He submited that it is against weight of evidence on record. According to the learned counsel the evidence on record clearly indicates that the plaintiff herself carried out the construction because she wanted to extend one more floor and for that purpose she wanted to strengthen the existing structure. This proposal was made by the plaintiff's husband and, therefore, the defendant allowed the plaintiff's husband to make the said construction. The plaintiff should have therefore, examined her husband because all these facts are within the knowledge of the husband. It was the duty of the plaintiff to adduce best evidence. The plaintiff has failed to adduce the best evidence . The impugned judgment and order, therefore, will have to be set aside.
3. I am unable to accept the submissions of the learned counsel. Both the courts have held that the construction is of a permanent nature. The permanent construction carried out is major. The common wall between the drawing room and the varandah had two windows each of the size of

38” x 63” inclusive of ventilation, and a door of the size 42” x 99” inclusive of ventilation. It is the case of the plaintiff that the defendant removed the frames and the shutters of (I) one of the said windows including the ventilatilon and of (II) the door including the ventilation and closed the portions occupied by the said windows and the said door with brick masonary work. The defendant further removed the frame and the shutters of the other window and pulled down part of the brick masonary work and after removing the frame and the shutters of the door and ventilation in the common wall between the original bed-room and the verandah and after cutting the ventilation part thereof fixed the frame and shutters in the newly made door out of the said window. Many other major alterations are described in the plaint. More particulars of the construction have been noted by the trial court in paragraphs five and six of its judgment.

4. The trial court has held that the construction is carried out by the plaintiff to strengthen the building. While dismissing the suit the trial court has held that the plaintiff ought to have examined the mason who carried out the construction. This approach is wrong. The plaintiff's case that there is construction of a permanent nature is admitted by the defendant. Once that is accepted, it was for the defendant to establish that he has not carried it out. This is particularly so when the construction is carried out in the

defendant's flat. The defendant's story that the plaintiff himself carried out this construction to strengthen the building is rightly rejected by the lower appellate court. The nature of the construction does not support his stand. If the plaintiff wanted to strengthen the existing building because she wanted to construct an additional floor, she would have carried it out on all sides of the building and not only on one side. It is significant to note that the defendant had filed cross objections stating that if it is held that the construction is carried out by him, then it must be further held that it is carried out for the beneficial enjoyment of the suit premises. It is true that alternative defences can be taken by a party but in the facts of this case such a stand reflects on the credibility of the defeneant's case.

5. There is also no substance in the contention of the defendant's counsel that the best evidence was not adduced by the plaintiff. The plaintiff has examined her son. Her son was managing the affairs. Therefore, his evidence can be relied upon.

6. In my opinion, the lower appellate court has rightly rejected the story of the defendant that the major permanent construction which was carried out in the defendant's flat was carried out by the plaintiff. The defendant has carried out this construction without the permission of the plaintiff. Hence no interference is called for with the impugned judgment and decree. The petition is dismissed.

7. At this stage the learned counsel for the petitioner states that some time may be granted to the petitioner as he wants to approach the Supreme Court. In the circumstances the operation of the order is stayed for a period of eight weeks from today to enable the petitioner to approach the Supreme Court. However, the petitioner and all adult members of his family shall file an undertaking in this court that if within a period of eight weeks he is unable to obtain any favourable order from the Supreme Court, the petitioner and all members of his family shall handover vacant, unencumbered and peaceful possession of the suit premises to the respondent-plaintiff.

8. Office to give authenticated copy.